81-2165

Office - Supreme Court, U.S.
FILED
MAY 28 1982
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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

KENNETH M. M.,

Petitioner,

v.

CLAIRE A. M.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

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QUESTIONS PRESENTED

(A) Was the Petitioner denied due process because the transcript of the trial in the Family Court of the State of Delaware for New Castle County was inadequate and insufficient for Appellant Review?

(B) Was the Petitioner denied due process and equal protection of law and a fair and impartial trial by Family Court Trial Judge who acted in an Arbitrary, unreasonable and capricious manner and not only abused his discretion, but displayed bias and prejudice?

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I. OPINIONS BELOW

(A) A copy of the unreported Opinion of the Family Court of the State of Delaware for New Castle County bearing the date

September 28, 1979 and is appended hereto (1A, infra).

(B) A copy of the unreported order of the Supreme Court of the State of Delaware bearing the date February 23, 1982 and is appended hereto (A14, infra.)

II. JURISDICTIONAL GROUNDS

This Petition seeks a Writ of Certiorari to the Supreme Court of the State of Delaware with respect to its judgment dated and entered on February 23, 1982, which Reversed in part (insofar as the contempt judgment is concerned); Reversed and Remanded in part (insofar as the miscellaneous personal property division is concerned); and Affirmed in the balance the judgment of the Family Court of the State of Delaware for New Castle County.

Jurisdiction of this Court is predicated upon 62 Stat. 929 (28 U.S.C.A. §1257(3)).

IV. CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE.

Article XIV, Amendments to the Constitution of The United States

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any persons of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

V. STATEMENT OF THE CASE.

This is a property division case involving the divorce of Petitioner Kenneth M. and Respondent Clair A. The assets of the parties were substantial and varied and included a nationally known school for autistic children, race horses, including Silk Stockings, extensive real estate, valuable antiques, and doll collections, movie rights, etc., and totaled and had future potential of millions of dollars. A divorce action was filed by the Respondent on or about February 13, 1978 and a divorce was granted on June 15, 1978, without contest. Thereafter, on September 28, 1979, the Family Court of the State of Delaware for New Castle County decided the ancillary matters and this decision was amended and/or supplemented by subsequent decisions which were all appealed to the Supreme Court for the State of Delaware.

That Court decided the case on February 23, 1982 by Order deciding that the judgment of the

Family Court of the State of Delaware be Reversed in part (insofar as a contempt judgment is concerned); Reversed and Remanded in part (insofar as the miscellaneous personal property division is concerned); and Affirmed in the balance.

This is petitioner's Petition for a Writ of Certiorari.

VI. STATEMENT OF FACTS.

The Respondent, Claire M. filed for divorce on Feburary 15, 1978 and it was obtained on June 15, 1978. Thereafter, the Family Court, after appointing a Receiver, ordering that all of the assets were to be sold at a public auction, abandoned that approach and shceduled a hearing on the ancillary matters which lasted from May 7, 1979 to June 19, 1979 in the evening hours. A decision was rendered on September 28, 1979 and supplemented by subsequent decisions. At the time of the hearing, the parties

testified at length about the marriage and assets accumulated. The assets were substantial and varies as previously stated.

At the hearing, the parties each called experts on the value of the school, on horses, real estate, their tax attorney, and even a movie producer. There were many other witnesses called and the Petitioner attempted or sought to call additional witnesses. However, the transcript is so inadequate that it is impossible to intelligently discuss the facts of this case. The Family Court's decision was appealed to the Supreme Court for the State of Delaware.

Thereafter, subsequent decisions of the Family Court dealt with other related matters, including an Order of November 3, 1980 where the Petitioner was ordered incarcerated for 10 days for an alleged contempt of court (which was reversed by the Supreme Court.)

VII. ARGUMENT

A. The Petitioner was denied Due Process because the transcript of the trial in the Family Court of the State of Delaware for New Castle County was inadequate and insufficient for Appellate Review.

The first appeal in this case from the Family Court was filed in October of 1979 and at that time, a complete transcript of the trial which took place from May 7, 1979 to June 19, 1979 during various evenings, was ordered. Despite various requests, inquiries and complaints, the transcript was not received for many many months and on March 5, 1980, Justice Quillen of the Delaware Supreme Court, in a letter opinion, requested the trial judge to expedite the preparation of the transcript. A transcript was finally received, but it was incomplete in that the stenographer had only typed one side of the tape. Thereafter, a Motion to Grant the

Appeal was filed by the Petitioner, but denied. In December, 1980, the transcript was finally received, some 14 months after being ordered, and after much effort. Unfortunately, after 14 months, the transcript was totally inadequate. As such, the Petitioner was denied his constitutional right of appelate review and in the interest of justice was entitled to a new trial. The law is clear as stated in Hinshow v. Dyer, Col. Supr., 443 P. 2d 992 (1968) as to inadequaticies in the transcripts:

> ". . .an imperfection in a reporter's transcript cannot be cured by quesswork or by indulging in inferences or presumptions and that a reviewing Court may of its own motion dismiss a proceeding where the record is confused or incomplete."

The transcript was not only confused and incomplete, it was totally inadequate. The Supreme Court of Delaware however, ruled to the contrary.

The transcript in this case, is filled with errors, gaps and "inaudibles" which was noted by the stenographer in the transcript. Each stenographer (and there are apparently several that typed the transcript) handled the transcription differently. Some would acknowledge gaps in the tapes in terms of digits or by some other notation. Those are recorded and can be seen and measured as to their severity. More important however, is the fact that some gaps are totally ignored and can only be seen by obvious errors or gaps.

Tables prepared on behalf of Petitioner, show for example, a total of 1,854 "inaudibles" as to the division of property hearing which covers 1,032 pages of transcript. It is not know what "inaudible" refers to and what is left out or even if all inaudibles were so noted by the stenographer. It should also be noted that of the total inaudibles as to the initial hearing which total 1,854, the

vast majority of them, namely 1,422 are found in volumes 3, 4, and 5, which is essentially the Petitioner's case, which have an average of 5 inaudibles per page. Consequently, consideration or review of Petitioner's testimony by the Delaware Supreme Court was impossible.

Unfortunately, as serious as the large amount of the noted inaudibles is, it gets much worse. Some of the inaudibles appear to be complete answers or questions or statements by the Court or attorneys. A review of the transcript revealed that there were a total of 278 such type of deficiencies. Of that total, 241 are found in Volume 3, 4, and 5, which, as stated, essentially encompass Petitioner's case. In addition, there are actual gaps in the transcript that are noted (and some that are not).

In the initial hearing there are a total of 77 such gaps plus 179 digits missing in that transcript. These are not just inaudibles of a

word or complete answers or questions, but entire sections because of malfunctioning, buzzing, blank, all talking at once, etc. .

As to the additional 179 digits, it is represented that each digit is approximately 3 lines. That means that in addition to the noted 1,854 "inaudibles" and 77 extensive gaps and 278 complete answers and questions, there are an acknowledged 537 lines of testimony (or objections and rulings) missing from this transcript (not counting what some typists did not bother to note).

Some examples of such gaps are as follows:

THE COURT: "(Inaudible twenty digits there is nothing but static drowning out the entire discussion) (Trial Transcript Volume 3, page 639)

* * * * * *

"June 11, 1979 Hearing

TREMENDOUS STATIC AND NOISE AT START OF TAPE THROUGH FIRST 27 MINUTES. EXTREMELY DIFFICULT TO GET. REEL 2875 METER READING 1538."

* * * * * *

"EVERYONE TALKING AT ONCE - IMPOSSIBLE TO UNDERSTAND" (Trial Transcript, Volume 4, Page 7)

* * * * * *

"(CAN ONLY GET A FEW WORDS SPORATICALLY)" (Trial Transcript, Volume 4, page 4)

* * * * * *

"(BAD STATIC - MAY NOT BE ACCURATE)" (Trial Transcript, Volume 4, Page 29)

* * * * * *

"(BLANK IN TAPE FOR THE NEXT TEN DIGITS. COURTROOM EQUIPMENT MALFUNCTIONED.)" (Trial Transcript, Volume 4, page 57).

In further illustrating this problem, Volume 3 for example, is only 67 pages long and in 67 pages, there are 499 inaudibles with 83 of them being complete answers or questions or statements and 12 gaps plus 372 acknowledged lines missing (124 digist at approximately 3 lines per digit.) Is the volume worth reading? Did this Petitioner receive the Appellate Review from the Delaware Supreme Court that he was entitled to?

Further, in addition to the noted deficiencies in the transcript, there are a number of errors in the transcript which are not noted as such, but are obvious errors. At times they are harmless errors, but we do not know how many more errors exist which are not so obvious and not so harmless. An example of a harmless error is where the transcript refers to "Richard S. Carpenter" testifying, but the correct name is Leanard S. Togman. However, there are times where the transcript starts abruptly with a witness testifying without being sworn in or any indication that a question was asked. These kinds of hidden, but serious errors alone raise substantial doubt about the adequacy of the transcript.

In light of the total inadequacies of the record, it was impossible for Petitioner to argue the merits of his case and as such, was denied his constitutional right to due

process and appellate review.

The problem of having proper and accurate records and transcripts for appellate review is probably common place throughout the nation. Without a proper transcript, appellate review is meaningless and there is absolutely no reason or excuse why there should not be a full and accurate transcript in every case. The Court has a duty to establish some guidelines which would require accurate transcripts throughout the nation as part of a citizen's right to due process of law as guaranteed by the United States Constitution.

B. Was the Petitioner denied Due Process and equal protection of the law and a fair and impartial trial by Family Court Judge who acted in an arbitrary, unreasonable and capricious manner and not only abused his discretion, but displayed bias and prejudice?

The trial court actions, statements and decisions indicated an impatience with this case, and especially the Petitioner, and the Judge was arbitrary, capricious, unreasonable, and displayed prejudice and bias. The law is clear that a judge should be disqualified if he has personal bias or prejudice.

The Family Court judge in this case should have disqualified himself from this case; he simply did not have the patience, impartiality and judicial temperment which is displayed from the very outset of the case. This was repeatedly indicated in the very beginning and throughout the trial. He not only was "fed up" with this case one hour or less after the trial started, but he referred to the trial as a "game" and at least by implication encouraged Respondent to commit perjury. The Delaware Supreme Court did concede in their order

in this case that the trial Judge acted nonjudicially but refused to reverse the case.

> "We do note, however, that many comments of the Trial Judge were of a nonjudicial tone and anture and his comment with regard to honesty in the courtroom was unworthy of a judicial officer. Due to the frequency of the comments, and our inability to explain them as monentary lapses to which anyone may be subject, we conclude the Trial Judge displayed a lack of patience and judicial temperament which reflects poorly on the Family Court and the judicial system." Kenneth M. v. Clair A., Del. Supr., Nos. 305, 1979; 326; 1979; 247, 1980; 346, 1979; and 284, 1980 (1982).

Nevertheless, the Delaware Supreme Court held that:

> "Further, although highly regrettable, the Trial Judge's displayed annoyance during the property hearings did not amount to personal bias or prejudice which would prevent him from fully and impartially considering all aspects of the case. See, Cavanagh, supra; see also, Woodward v. City Stores Co.

D.C.Ct. App., 334 A.2d 189 (1975); Link v. Link, Md. Ct. App., 371 A.2d 1146 (1977). Therefore, refersal for judicial bias is not required."

In light of the clear and undisputable display of bias and prejudice, the Delaware Supreme Court clearly erred in so holding. The list of incidents that demonstrates bias and prejudice before, during and after the various hearings, include, but is not limited to the following:

Without a hearing, he ordered that the Petitioner's $2,500.00 per month salary for a corporation the parties owned and which the court had no jurisdiction over,

be terminated until he complied with discovery. This order was later vacated.

Another example of the trial judge's attitude that he couldn't be bothered with this case was an Order that he entered prior to the trial and without a hearing which appointed a Receiver to auction off all of the parties vast and diversified assets at a public auction in 60 days. He was eventually forced to abandoned such a ridiculous and arbitrary order, but it certainly was a simply way to avoid a trial.

On the very first day of the trial, the judge's impatience, bias and prejudice with this case was apparent. The transcript reveals that Respondent complained that the attorney was playing a game, and the Court made the following comment:

> THE COURT: Look, let's get the rules straight. The way games are played, that's the biggest game of all - the Courtroom. This is a game. Anyone tells you it's not, it's not true.

> This is a game, and we are playing by the rules. You've got to play by them." (Trial Transcript, Vol. I, p. 57)

Respondent responded; "I thought honesty was the best policy."

In response, the trial judge's response was "That's not always true in Court. Let's go ahead." (Trial transcript, Vol. I, p. 57).

The Court concluded by saying:

"I don't care if the Supreme Court hears this. I'm really fed up with this case. I won't (inaudible)." (Emphasis Added.) (Trial Transcript, Vol. I, pgs. 57-58)

The trial, which was to last over several evening sessions from May 7, 1979 to June 19, 1979, had just started and was only an hour or so in progress and the judge was already "Fed up with this case" and was telling the Respondent that honesty is not always the best policy in his Court.

There were other indications of the trial judge's prejudice in this case at the trial, which is evident in the record. Unfortunately, the transcription of the tape is so bad that all of the lower court's comments are not transcribed and/or their meaning is not clear. For example, Volume V, Page 55, the trial judge makes the following statement:

> THE COURT: "I like that little (inaudible) The Chief Justice ought to be able to read that (blank in tape)."

After the trial and a decision was rendered, which was appealed, Petitioner sought a stay of the award because of the appeal. During a telephone conference on November 28, 1979 to consider the petition for a Stay with the trial judge and counsel, and before the matter was even near conclusion, the trial judge simply hanged up the phone, and the next day issued an Order.

That is certainly an effective way to cut off debate and the opportunity to be heard, but it is also a denial of due process.

Another example of the trial judge's arbitrariness and bias or prejudice was his refusal to reschedule a routine type hearing because Petitioner's counsel had a death in his family. The continuance request, in a very arbitrary and insensitive manner, was denied by the Court and the matter proceeded to a hearing without counsel, and the Petitioner was found in contempt. Fortunately, that was stayed by the Delaware Supreme Court and again, Petitioner requested that the judge disqualify himself, but again the judge refused.

He refused to reschedule a time for exchange of properties by the parties that he set for a date when Petitioner was

scheduled to be out of town on business even though a timely request was made for a couple of days delay, but did not even respond to the request until the day before the scheduled pick-up, after Petitioner had already left for his business trip.

The day before the scheduled pick-up in a telephone conference he stated that as far as he was concerned, Petitioner had "violated" his Order. Subsequently, a new pick-up was scheduled and a hearing was scheduled for November 3, 1980 on a Rule to Show Cause why Petitioner should not be held in contempt of Court for not being available for the initial date. Petitioner again requested the Judge to disqualify himself since he had already expressed that Petitioner "violated" his Order, but he again refused.

At the hearing, after testimony of Respondent and even before Petitioner left the stand after testifying; and before any opportunity was given to make any statements, or to call any other witnesses, the Judge found Petitioner to be in contempt. It was obvious that he simply could not wait to do so.

Thereafter, there was a discussion as to how the pick-up would continue, and Petitioner offered various alternatives to make sure that it was accomplished properly. In what appeared to be a calculated and callous manner, the Court simply announced that Petitioner would not be there because he would be in jail. He then told Petitioner's counsel to "Go to the Supreme Court." (Page 40 of the Trial Transcript of Nove... ...
It was apparent from the way Petitioner was found to be in contempt, and from the way he was sentenced to ten days in jail,

that the Court was extremely prejudicial towards him. An immediate appeal was taken to the Delaware Supreme Court and the Order was stayed and later reversed. This incident is however, indicative of the Court's bias and prejudice towards the Petitioner.

Thereafter, a Motion to hold Petitioner in contempt was filed and the Judge was again asked to disqualify himself. The hearing dealt with a Court Ordered pick-up that was supervised by the Judge's Bailiff, who would be the main witness. The Judge refused to disqualify himself and a Writ of Prohibition seeking to prohibit him from any further participation was filed. Thereafter, on January 5, 1981, the Chife Judge of the Family Court reassigned the case to

another judge. It was ascertained later that the trial judge had talked to his Bailiff and knew what his testimony would be, but yet he had refused to disqualify himself. That alone was ample basis for disqualification.

The Trial Court's conduct violated Canon 3-A(4) of the Canons of Judicial Conduct and he should have disqualified himself for that reason alone, but he refused to do so because he wanted another opportunity to try and impose sanctions on the Petitioner. As stated by the Delaware Supreme Court in Matushefske v. Herlihy, Del. Supr., 214 A.2d 833 (1965):

> ". . .Every litigant is entitled to trial by a disinterested judge." Id. at p. 836.

There can be no question that the Judge had personal bias and pre-conceived opinions in this case from the outset.

> "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned. . .Code of Judicial Conduct, Canon 3-C(1)(a)." Id. at p. 574.

There can be no question that in this case the Court's impartiality can and was reasonably questioned.

It is obvious that the trial judge displayed bias and prejudice throughout the proceedings against the Petitioner and should have disqualified himself at the very outset. He simply did not want to be bothered with the case and somehow directed his feelings against the Petitioner. Probably in every court in the nation, every day, the problem of arbitrary and unreasonable and biased and prejudiced judges is experienced and a citizen of this nation probably unjustly suffers at the hands of such judges. This Court has a duty to its citizens, and the States to correct such injustice

when it is brought to its attention and establish some guidelines and decisional law on this probably prevelant problem. This court could assist every litigant in the nation to assert more effectively his right to be tried by a just and impartial judge and not to be subjected to an arbitrary and unreasonable judge.

VIII. CONCLUSION

For the foregoing reasons, the Petitioner was denied his Constitutional right for due process and equal protection of the law and a fair and impartial trial by the Family Court of the State of Delaware. Consequently, it is respectfully submitted that the Petition for certiorari be granted and the judgment of the Supreme Court of the State of Delaware be reversed.

Respectfully Submitted,

L. VINCENT RAMUNNO
Attorney for Petitioner

APPENDIX

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1. OPINION OF THE FAMILY COURT OF THE STATE OF DELAWARE

IN THE

FAMILY COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

CLAIRE A.M.,

Petitioner,

v.

KENNETH M.M.,

Respondent.

OPINION.

The parties were married on September 18, 1964, separated on January 4, 1978, and divorced on June 15, 1978. There were no children born of the marriage. The petitioner is 52 years old and has been married previously. This is the first marriage for the respondent who is 39 years

old.

The petitioner has graduated from high school and nursing school. She suffers from several diseases which have disabled her from performing any physical labor. The respondent has a college degree and apparently is in excellent health.

The parties, after their marriage, engaged in various business ventures which have been highly successful. This is an extremely difficult case in which to value the parties' marital assets because of the nature of the businesses in which they have engaged and the types of assets which underlie those businesses. It is also an old case by this Court's standards. It has been on the docket for trial on three different occasions and for various reasons has never moved. The Court's problems have not been diminished by the litigants or their attorneys.

At one time, the Court threatened to

sheriff sale all of the marital assets. This position was taken because no one knew, or if they did know would not divulge, what assets the parties had. Additionally, the assets of which the Court was made aware were of such a unique nature that valuation of them was unrealistic. For example, what is the value of an antique-doll collection or Silk Stockings the race horse or 20-odd racehorses or a school for autistic children? The only reason the Court did not proceed with the sheriff's sale was because most of the assets were in corporate names, and the Court is of the opinion that it lacks the authority to pierce the corporate veil. Additionally, a sheriff's sale of the stock alone would bring so little revenue that it would be an abuse of the Court's discretion to force its sale as such a price.

In a further attempt to move this stagnant litigation, a Receiver was appointed. The Receiver worked diligently and submitted reports

to the Court. After the first report was received, the attorneys for the litigants informed the Court that the report was misleading because it did not list certain mortgages. Thus, the case went to trial.

The trial of this case occurred during the evening hours because of the Court's busy schedule. In trial time alone, this case has consumed approximately thirty hours. Those thirty hours were some of the worse moments I have spent in the courtroom. Highlights of the evidence was an impassioned plea by a Hollywood director accompanied by applause from the litigants, petty bickering between the litigants, facial exchanges between the litigants which caused outbursts from the other litigant, attempts to repeatedly examine and re-examine witnesses by attorneys, a citation for contempt and a fine of $500 levied against one litigant. After listening to such nonsense, the Court wonders how it is expected to make an

intelligent division of the parties' marital assets.

I have intentionally set forth the actions of the litigants for the appellate court because I fully expect to be appealed. Additionally, I would like to caution the attorneys and the litigants that this conduct shall not be tolerated in the future. The termination of a marriage is an emotional experience, and a degree of latitude should be given to the parties. However, decorum must and shall be maintained in the courtrooms of this State.

Attorneys who represent difficult clients are not excused from the application of the rules of evidence or procedure. Additionally, they are expected to be prepared to the extent that they can present a clear and precise case to the Court for adjudication. It is not the Judge's function to make order out of chaos which has been created either deliberately or by non-preparation of the litigants.

At the conclusion of this case, the attorneys requested to submit memoranda to the Court outlining the pertinent evidence and their interpretation thereof. Additionally, those memoranda were to contain the relief that each party expected to be granted by the Court. Subsequent to the hearing, a telephone conference was held between the attorneys and this Judge. The Court allowed the respondent's attorney to supplement the record with the petitioner's checking-account statements. The ruling had already been made at trial that the respondent could supplement the record with these documents at a later time. Respondent's attorney also requested to open the record on two other issues. This request was denied. The attorneys thereafter agreed that they would not file any memoranda stating their positions.

The attorneys also stipulated, after the trial, that the litigants' yearlings would be sold at the September Tattersall's Auction, and

their racehorse Fury would be sold at Meadowlands' Auction. The net proceeds of each sale were to be divided equally. (Letter of July 23, 1979 by petitioner's attorney). The issues for this Court to decide are attorney's fees, costs, and property division.

Attorney's fees and Costs. The parties have marital assets of between $2,000,000 and $3,000,000. Each party shall receive substantial assets and therefore shall pay their own attorneys from the separate assets.

Property Division. The Au Clair School has suffered some reversals recently. The State may refuse to grant it a license, and several states who have been sending autistic children may no longer fund these children. The business needs supervision to survive. I believe it can and shall if the respondent devotes an appropriate amount of time to managing the business. Thus, he shall receive 51% of the shares of this corporation, and petitioner shall receive 49%

of the shares. I have placed no value on this asset because I am not dividing it. I am merely giving the petitioner a smaller percentage so that respondent may effectively manage this corporation. It is my opinion that the 2% difference in their stock positions will not appreciably affect the distribution of the marital assets.

The Au Clair Syndicate, Inc. contains the parties' best horses; namely, Silk Stockings, Au Clair, and a percentage of Nero. It is my opinion that petitioner is capable of handling this business. She shall be awarded 51% of the shares of this corporation, and respondent shall receive 49%. No value is placed upon this asset for the same reason that no value was placed upon the school.

Real Estate. The petitioner shall receive the Odessa property, subject to one-half of the parties' outstanding mortgages of $350,000. The Receiver valued this at $510,000. The respondent

valued it at $630,000, and the petitioner valued it at $510,000. I accepted the value of the Receiver as accurate because they are based upon the appraisal of Mr. West, of Patterson and Schwartz, whom I find to be the more credible appraiser.

The respondent shall receive the Middletown property and the Maryland cottage. Respondent's figure is lower than the figure indicated by the Receiver and the petitioner. I accept the value placed on the property by the Receiver. Those values are $496,500 and $10,000, or $506,500. This property shall assume one-half of the parties' outstanding mortgages, or approximately $175,000.

Personal Property. The personal property which each party has in his or her possession at this time, he or she shall retain. The personal property which is located at the Au Clair School, such as antiques, the doll collection, etc., shall remain the property of the corporation.

The proceeds from the sale of grain which amounts to $19,000 shall be divided equally between the parties.

Both parties shall keep the cars they are presently driving.

The insurance of the 1975 Mercedes shall be divided equally.

The movie and literary rights to Silk Stockings shall be divided equally.

Any payment that either party has received prior to this order for any horse shall be divided equally. The parties' holdings of Nero Syndicate, Bee Gee's Bunny, Daisey's Dream Time, and Greentree Theresa shall remain the same.

The respondent is to retain the farm equipment. It is understood that the farm equipment does not mean racing equipment. Respondent placed a value upon this machinery of $48,000.

The petitioner's remaining horses shall be divided as follows:*

Petitioner		Respondent	
St. Ann AuClair	$125,000	Helen AuClair	$150,000
All Smiles	$ 60,000	Crystal AuClair	$ 1,000
Peanut Ann	$ 80,000	Flon	$ 7,500
Soft Shoulders	$ 25,000	Magnolia Victory	$ 8,500
Queen Barbara	$ 35,000	Virgie	$ 8,000
Louise AuClair	$ 85,000	(Farm Equipment)	$ 48,000
TOTAL (64%)	$410,000	TOTAL (36%)	$223,000

*I have accepted the values placed upon the horses by Mr. Lowery, respondent's expert. If I had accepted petitioner's values, the proportions would have been 52% for petitioner and 48% for respondent.

I have endeavored to divided the marital property in an equal fashion with the exception of the horses. The balance sheet which accompanies this opinion and order shall explain any discrepancies.

I have awarded the petitioner a greater share of the overall estate because of her age and physica

condition. It is my opinion that the respondent is capable of making much more money in the future than the petitioner. I also considered the factors which are listed in 13 Del. C. §1513; namely, subsection (a), subparagraphs (4) and (8).

IT IS SO ORDERED.

JAMES J. HORGAN,

Judge

DATED: September 28, 1979

Mazik v. Mazik

Petition No. 345, 1978

BALANCE SHEET

	Petitioner	Respondent
Au Clair School, Inc.	-	$
Au Clair Syndicate, Inc.	$	
Real Estate:		
Odessa	$510,000	-
Middletown	-	$496,500
Maryland Cottage	-	$ 10,000
Horses	$410,000	$223,000
TOTAL	$920,000	$738,500

2. OPINION OF THE SUPREME COURT OF DELAWARE

IN THE

SUPREME COURT OF THE STATE

OF DELAWARE

Nos. 305, 1979; 326, 1979; 247, 1980; 346, 1979; and 284, 1980

KENNETH M. M.,

Respondent Below,

Appellant,

v.

CLAIRE A. M.,

Petitioner Below,

Appellee.

(February 23, 1982)

ORDER

This 23rd day of February, 1982,

Upon consideration of the briefs submitted

by the parties and oral argument before the Court on October 15, 1981, it appears to the Court that:

(1) In these Family Court appeals, consolidated for disposition by Order of this Court dated Decmeber 23, 1980, husband challenges the propriety of: (a) the Trial Court's post-divorce division of the parties' marital property; and (b) various rulings issued incident thereto. The several contentions raised by husband will be addressed seriatim.

(2) First, husband contends that the transcript of the property division hearing is inadequate for appellate review, requiring reversal of the decision below and a new trial. In view of the grounds for relief advanced by husband, however, the transcript before us fully lays the basis for meaningful appellate argument. Consequently, general reversal on this ground is not warranted. Kent v. County

of Hudson, N.J. Super., A.D., 234 A 2d 489 (1967).

(3) Second, husband argues that a new hearing before an impartial judge is required because of the original Judge's predisposition or bias against him. To support this allegation of unjudicial behavior, husband relies upon: (a) numerous adverse rulings made throughout the post-divorce proceedings; and (b) the Judge's conduct chiefly during the first property division hearing.

(4) Husband's "adverse rulings" argument is without merit. Even if erroneous, adverse rulings alone are insufficient to establish prejudice on the part of a trial judge, Knapp v. Kinsey, 6th. Cir., 232 F. 2d 458, cert. den., 352 U.S. 892 (1956); Cavanagh v. Cavanagh, R.I. Supr., 375 A. 2d 911 (1977); and our review of the record discloses no "particular ruling, order, or act on the part of the court that was inherently unfair or hostile to [husband] . . ."

Cavanagh, supra, at 918 (citation omitted).

(5) Further, although highly regrettable, the Trial Judge's displayed annoyance during the property hearings did not amount to a personal bias or prejudice which would prevent him from fully and impartially considering all aspects of the case. See, Cavanagh, supra; see also, Woodward v. City Stores Co., D.C. Ct. App., 334 A.2d 189 (1975); Link v. Link, Md. Ct. App., 371 A. 2d 1146 (1977). Therefore, reversal for judicial bias is not required. We do note, however, that many comments of the Trial Judge were of a nonjudicial tone and nature and his comment with regard to honesty in the courtroom was unworthy of a judicial officer. Due to the frequency of the comments, and our inability to explain them as momentary lapses to which anyone may be subject, we conclude the Trial Judge displayed a lack of patience and judicial temperament which reflects poorly on the Family Court and the judicial system.

(6) We find no merit with husband's third contention that the decision below was invalid as having been based, in whole or in part, on the recommendations of an illegally appointed receiver. In view of the unique and complicated state of financial affairs confronted by the Trial Court in this case, we find that the Court did not abuse its discretion in employing the admittedly well-qualified receiver for the purposes ultimately used. See 13 Del. C. § 1516(c). And, since the receiver merely made recommendations concerning distribution of the parties' assets, the Trial Judge did not abdicate his own responsibility to equitably divide the marital estate. See 13 Del. C. § 1513(a); see also J.D.P. v. F.J.H., Del.Supr., 399 A. 2d 207 (1979). We suggest, however, that such employment be resorted to in the future only in cases of pressing necessity.

(7) Husband's fourth contention concerns certain evidentiary rulings made by the Trial

Judge during the property division hearing. Specifically, husband asserts that the Judge abused his discretion in refusing to admit into evidence: (a) the testimony of two employees of the parties' school; and (b) a Division of Social Services file said to contain information which supported husband's assertion that wife intentionally dissipated marital assets. See, 13 Del. C. § 1513(a)(6).

(8) The record indicates that the testimony sought to be elicited from the two employees was cumulative in nature, three prior witnesses having similarly testified. The Trial Judge therefore exercised sound discretion in barring its admission. Morrarty v. Reali, R.D. Supr., 219 A. 2d 404 (1966); Duffy v. Griffith, Pa. Super., 4 A. 2d 170 (1939); see, Delaware Uniform Rule of Evidence 403.

(9) Further, given husband's failure to make a substantial preliminary showing that the D.S.S. file contained material evidence

supportive to his "dissipation of assets" argument, we find no abuse of discretion in the Trial Judge's refusal to order the production of the file for husband's use at trial. Family Court Rule 120(a)(1). Production orders will not be issued for the purposes of "fishing expeditions." Marietta Mfg. Co. v. Hedges-Walsh-Weidner Co., Del. Super., 2 A. 2d 922 (1938); 29 Am. Jur. 2d Evidence § 843 (1967). Moreover, the Trial Judge could have reasonably found that the information desired was collateral in nature and affected by public policy considerations which negated its meaningful probative value.

(10) Fifth, husband contends that remand is required since the Trial Court, in distributing marital property, failed to consider the parties' accrued tax liability. J.D.P. v. F.J.H., supra. However, the record, albeit with gaps, reveals no established liability for the Court to consider. The parties' tax attorney, while testifying

that several tax claims against the parties and their corporations remained outstanding, also admitted that a reliable estimate of total liability could not be ascertained. This being the only competent evidence on the issue, husband's contention is without merit.

(11) We also find no merit with husband's sixth contention that the Trial Court's corporate control division constituted an abuse of discretion. In view of the parties' documented inability to amicably resolve their differences and Family Court's responsibility to finally settle the parties' financial ties in one proceeding, Wife W. v. Husband W. Del. Super., 307 A. 2d 812 (1973), aff'd Del. Supr. 327 A. 2d 754 (1974), the division of corporate control was entirely proper. Indeed, given the personal circumstances of the parties before the Court, we find the corporate control division patently reasonable.

(12) Seventh, husband contends that the

Trial Court's award of a disproportionate share of the parties' assets to wife constitutes an abuse of discretion warranting a new trial. We disagree as far as the award to wife of more that one-half of the major marital assets, finding it to have been entirely proper for the reasons stated in the Court's opinion and order dated September 28, 1979. However, we do find that the Trial Court, in distributing the parties' miscellaneous personal property on August 11, 1980, neither followed the general guidelines for asset distribution established by this Court nor made the special circumstances for departure therefrom a matter of record in this case. Husband R.T.G. v. Wife G.K.G., Del. Supr., 410 A. 2d 155, 159 (1979). We recognize that special circumstances may well be present as to this miscellaneous personal property, but the record fails to show that reasonable discretion was properly exercised. We therefore remand this aspect of the case for reconsideration

and such proceedings as necessary to be consistent with R.T.G., supra.

(13) Eighth, husband contends that the contempt proceeding instituted against him and the prison sentence which resulted thereform were constitutionally impermissible. In view of the Trial Court's implicit, if not explicit, intent to "punish" husband for past misbehavior, along with the Court's imposition of a fixed term of imprisonment, the contempt proceeding instituted against husband was criminal in nature. State v. Mancari, Del. Supr., 223 A. 2d 81 (1966); Board of Education of the City of Shelton v. The Shelton Education Association, Conn. Supr., 376 A.2d 1080 (1977). The special procedure followed in Delaware in a criminal contempt proceeding was disregarded in this case. 11 Del. C. §§ 202, 1271. See also, City of Wilmington v. General Teamsters Local Union 326, Del. Supr., 321 A. 2d 123, 125 (1974).

Compare 11 Del. C. § 1272. Husband's "conviction" and "sentencing" were therefore improper and must be reversed.

(14) This Order is entered under the provisions of Rule 17(a) of this Court.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Family Court be and it hereby is

REVERSED in part (insofar as the contempt judgemnt is concerned);

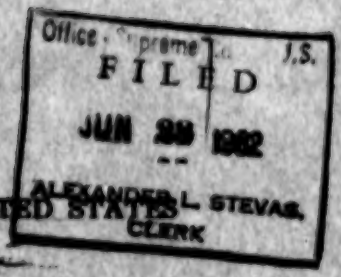
REVERSED and REMANDED in part (insofar as the miscellaneous personal property division is concerned); and

AFFIRMED in the balance

BY THE COURT:

WILLIAM J. QUILLEN,

Justice



IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-2165

KENNETH M. M.,

Petitioner,

v.

CLAIRE A. M.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Delaware

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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OPINIONS BELOW

1. September 28, 1979 Delaware Trial Court Decision:

The Delaware Family Court entered an opinion

and order dividing the parties' marital property. (Appendix pp. A-1-12 to the Petition for a Writ of Certiorari, is cited as A-__. Respondent's Appendix reference is RA-1.) This decision and three later orders related to the property division were appealed by petitioner to the Supreme Court of Delaware, designated as Supreme Court Nos. 305, 326 and 346 (1979) and 247 (1980).

On November 3, 1980, the Delaware Family Court entered a contempt order based upon petitioner's failure and refusal to comply with that Court's prior property division order. This order was appealed by petitioner to the Supreme Court of Delaware, designated as Supreme Court case No. 284 (1980).

2. February 23, 1982 Supreme Court of Delaware Order:

Petitioner's five appeals were consolidated and ruled upon in the Supreme Court of Delaware's Order of February 23, 1982. (A-14-24.) The property division orders (excepting that order relating to "miscellaneous personal property") were affirmed. The contempt order was reversed.

QUESTION PRESENTED

Whether this Court should grant certiorari to the Supreme Court of Delaware to review its order affirming the trial court's property division order where petitioner was able, despite a partially defective transcript, to fully argue all meaningful issues sought to be raised on appeal, and where the trial court judge's display of annoyance did not amount to personal bias or prejudice.

COUNTERSTATEMENT OF THE CASE

This marital property division case involves a unique, complicated and highly acrimonious personal dispute between former spouses. (A-4, 5, 18, 21.)[1] Respondent Claire A. M., now age 55, suffers from several diseases which render her physically disabled. (A-2.) Petitioner Kenneth M. M., now age 42, is, in contrast to Claire, highly educated, in excellent health and far exceeds Claire in his present and future capacity for amassing income. (A-2, 12.)

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1. The sole record before this Court consists of the Delaware Family Court and Delaware Supreme Court opinions below (A-1-24) and Questions Raised by Petitioner Before the Delaware Supreme Court (RA-1).

A property division hearing was held during 30 evening hours in May and June, 1979. Because the trial judge fully anticipated appellate review, he intentionally described in his opinion the litigants' behavior during the property division hearing. That behavior provided the trial judge with ". . . some of the worst moments I have spent in a courtroom." (A-4, 5.) The trial judge had to tolerate the parties' continual and serious breaches of court room decorum and "chaos which has been created either deliberately or by non-preparation of the litigants." (A-5.) The judge's annoyance with this behavior was reflected in action not against petitioner, but only against respondent, who was fined $500 for contempt of court. (A-4.)

In the Supreme Court of Delaware, petitioner raised and fully argued seven points pertinent to the trial court's property division decision.[2]

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2. An eighth argument related only to the contempt order against petitioner made 17 months after trial. While petitioner states that he wishes a reversal of the Delaware Supreme Court judgment (Petitioner's Brief in Support of the Petition for a Writ of Certiorari, 28), his petition is directed to the adverse property division rulings and not to the separate and successful contempt appeal below.

The Delaware Supreme Court held that the trial court's management of the case and evidentiary rulings were a proper exercise of its discretion. (A-18-21.) The Delaware Supreme Court also held that the merits of the property division [except the personal property ruled upon ten months after the trial (A-22)] were decided in a "patently reasonable" and "entirely proper" manner. (A-21-22.)

Petitioner also argued below—and now argues—that the trial transcript of the property division hearing was inadequate for appellate review and that the trial court had a predisposition or bias against him. The Delaware Supreme Court found such arguments to be without factual or legal merit (A-15-16), but criticized the trial court for its displayed lack of patience and judicial temperament. (A-17.)

Neither petitioner's Statement of the Case nor his Appendix states when, where or how any federal question was raised or passed upon below.[3] Petitioner

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3. The issues petitioner did raise and argue are set forth at RA-1.

does not quote the record to establish that a federal question was timely and properly raised or passed upon below. See Rule 21.1(h) of this Court.

ARGUMENT

I. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE NO FEDERAL QUESTION WAS RAISED BY PETITIONER AND PASSED UPON IN THE DELAWARE COURTS.

A. This Court does not grant certiorari to a state court where the federal question or constitutional issue presented had never been raised and passed upon in the courts below. **Cardinale v. Louisiana**, 394 U.S. 437 (1969). As a result, this Court lacks jurisdiction under 28 U.S.C. §1257(3) to review the rulings below where the assertion of constitutional issues arises, as here, for the first time. Id., at 438-439.

Petitioner's federal questions are raised here by bare assertions, without even a contention, much less a showing, that they were raised and passed upon below. Petitioner makes no record reference to the jurisdictional criterion. See **Department of Mental Hygiene v. Kirchner**, 380 U.S. 194, 197 (1965) (Petitioner's burden

to establish jurisdiction by clear showing of federal question raised and decided below) and Rule 21.1(h).

Even if the federal questions presented were properly brought to the attention of the lower court—which cannot be gleaned from the closest scrutiny of the Delaware Supreme Court's opinion—it is clear that the Delaware Court did not rely, reach or rule upon any constitutional issue.

B. The decision below was based upon issues of state law and was correctly reached.

The sole and correct standard for determining whether a trial transcript is adequate for appellate review is whether the transcript, taken as a whole, prevents an appellant from raising the relevant grounds of appeal or disables the appellate court from deciding them. **Kent v. County of Hudson**, N.J. App., 234 A.2d 489, 491 (1967). (A-15.) The Court below, having reviewed all of the grounds for relief advanced by petitioner and the entire transcript, held that the transcript ". . . fully lays the basis for meaningful appellate argument. Consequently, general reversal on this ground is not warranted." (A-15.)

Petitioner now asks this Court to make another review of the voluminous trial transcript to see whether it can find what the Supreme Court of Delaware was utterly unable to find—that having raised the seven non-constitutional issues passed on by the Supreme Court of Delaware after 78 pages of briefing and full oral argument, petitioner was deprived of his ability to argue the pertinent issues on appeal and the Delaware Court was deprived of its ability to determine those issues. This Court should not and need not be rummaging through a trial transcript which the Delaware Supreme Court found to be factually and legally adequate.

As to petitioner's "bias or prejudice" contention, based upon adverse rulings and the trial judge's displayed annoyance with both parties and counsel, the Delaware Supreme Court first reviewed the entire record before it. That voluminous record included no less than 63 docket entries, more than 80 documents, 305 pages of appendices, 146 pages of briefs and almost 1,000 pages of transcript. The Supreme Court concluded that there

was not one "particular ruling, order or act on the part of the court that was inherently unfair or hostile to [petitioner]" (A-16; emphasis supplied). The trial judge's display of annoyance never "prevent[ed] him from fully and impartially considering all aspects of the case." (A-17.) The court therefore held that there was no factual or legal basis for the claim of personal bias or prejudice. See **Cavanaugh v. Cavanaugh**, R.I. Supr., 375 A.2d 911, 917-18 (1977). (A-17.)

Petitioner now asks this Court to again review the same record (which petitioner chose not to make part of the record before this Court) to reevaluate the Delaware Supreme Court's factual determinations that every one of the trial judge's rulings was fair and made without personal hostility and that the trial judge's annoyance (however provoked) did not prevent an impartial consideration of all aspects of the case.[4]

---

4. The Delaware Supreme Court's criticism of the trial judge's "lack of patience and judicial temperament" (A-17) was directed to the trial judge personally and did not affect the Supreme Court's conclusion as to the absence of personal bias or prejudice.

II. THE QUESTIONS PRESENTED BY PETITIONER DO NOT WARRANT REVIEW BY THIS COURT.

A. The petition does not present an important but unsettled question of federal law which should be decided by this Court. See Rule 17.1(c).

B. The petition involves no issues of public significance. It merely seeks review of the particular facts that affect the parties' personal interests. See **N.L.R.B. v. Pittsburgh S.S. Co.**, 340 U.S. 498 (1951) (Certiorari should be denied where a new review of evidence is sought).

C. The petition presents problems that are unique to this case and are unlikely to recur frequently.

Petitioner has been able to seize upon the transcript question because an outmoded audio tape system was used in 1979 in the Delaware Family Court. The system was completely replaced in 1980. Modern court administration and equipment both militate against recurrence of courtroom transcription problems.

The bias or prejudice question is often the grievance of an unsuccessful litigant. The Delaware

Supreme Court's public criticism of the trial judge's patience and temperament will certainly have a salutary effect.

CONCLUSION

For the reasons set forth herein, this petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: June 28, 1982

RESPONDENT'S APPENDIX

QUESTIONS RAISED BY PETITIONER BEFORE THE DELAWARE SUPREME COURT

I. IS A NEW TRIAL REQUIRED BECAUSE THE TRANSCRIPT IS INADEQUATE FOR APPELLATE REVIEW?

II. SHOULD THE FAMILY COURT'S DECISION IN THIS APPEAL BE REVERSED BECAUSE OF THE LOWER COURT'S BIAS AND PREJUDICE?

III. WAS THE LOWER COURT'S DECISION INVALID AS HAVING BEEN MADE IN WHOLE OR IN PART BY AN ILLEGALLY APPOINTED RECEIVER?

IV. SHOULD THE FAMILY COURT'S DIVISION OF PROPERTY BE REVERSED?

V. WAS THE FINDING OF CONTEMPT AND SANCTIONS IMPOSED ON APPELLANT BY JUDGE HORGAN [7 months after the property division trial] IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS?

Source: Petitioner's Opening Brief on Appeal before the Delaware Supreme Court, page 2a.

PROOF OF SERVICE

I hereby certify that all parties required to be served have been served copies of Brief of Respondent in Opposition to Petition for a Writ of Certiorari, that service has been made on petitioner pursuant to Rule 33(1) by personal service, by hand delivery on June 28, 1982 to petitioner's counsel of record: L. Vincent Ramunno, Esquire, Tenth and French Streets, Wilmington, Delaware, 19801.

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